

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	DETERMINATION
HEIDI ZEITMAN AND JACK ZEITMAN	:	DTA NOS. 812377
	:	AND 812378
for Redetermination of Deficiencies or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law and the New York City	:	
Administrative Code for the Year 1986.	:	

Petitioners, Heidi Zeitman and Jack Zeitman, 2737 Arizona Biltmore Circle, Phoenix, Arizona 85016, filed petitions for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 1986.

A consolidated hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on August 8, 1994 at 1:30 P.M. In a letter dated October 3, 1994 petitioners were given until November 7, 1994 to serve and file their brief which started the six-month period to issue this determination. The Division of Taxation filed a letter brief on October 7, 1994. Petitioners submitted a reply letter brief on October 24, 1994. Petitioners appeared by Rosensteel & Beckmann, Esqs. (Edward M. Rosensteel, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

ISSUE

Whether petitioners have established that they had reasonable cause for their failure to timely file and pay over taxes due, entitling them to an abatement of penalties.

FINDINGS OF FACT

On May 12, 1989, petitioners, Jack and Heidi Zeitman, filed a New York State Resident Income Tax Return for the year 1986. On this return they selected a filing status of married filing separately on one return. The return listed Mr. Zeitman's occupation as an executive and showed that the great preponderance of his income was from wages, salaries and tips. Mr. Zeitman reported a net loss of \$122,599.00 under the category of rent and royalty income and a net loss of \$244,095.00 from a series of partnerships. He also reported that New York State tax was due in the amount of \$97,511.00 and that City of New York resident tax was due in the amount of \$43,140.00. The return shows that there were total payments of \$41,080.00. However, the amount due was increased on lines 76 and 77 of the return because petitioners included interest of \$10,509.00 and penalty of \$10,067.00, for an amount owed of \$120,147.00.

The foregoing income tax return listed Mrs. Zeitman's occupation as an administrator and reported that a little more than one-half of her total income was from wages. Mrs. Zeitman reported total New York State taxes due of \$1,207.00, plus City of New York tax of \$436.00, for a total New York State and City of New York liability of \$1,643.00. Tax was withheld in the amount of \$542.00, resulting in an amount owed of \$1,101.00. In conjunction with their return, petitioners remitted a check in the amount of \$121,248.00.

Prior to filing their income tax return, petitioners were granted an automatic four-month extension of time to file. They then received an extension until October 15, 1987 to file their New York State income tax return for the year 1986. In their application for the extension petitioners explained that they needed an extension because "[i]nformation from third parties necessary to file a complete and correct return is unavailable at the present time".

The Division of Taxation ("Division") issued a Notice of Deficiency, dated December 10, 1990, to petitioner Heidi Zeitman which asserted that she was liable under Article 22 of the Tax Law for the year 1986 for interest of \$193.08 and penalty of \$436.00, for a balance due of \$629.08. The Division also issued a Notice of Deficiency, dated December 10, 1990, to petitioner Jack Zeitman which asserted that Mr. Zeitman was liable under Article 22 of

the Tax Law for the year 1986 for interest of \$17,461.28 and penalty of \$37,426.00, for a balance due of \$54,887.28. Penalties were asserted on each of the foregoing notices pursuant to Tax Law § 685(a)(1) for failure to file a timely return, Tax Law § 685(b)(1) for negligence and Tax Law § 685(b)(2) which is a 50% interest penalty for negligence.

After the foregoing notices were issued, the parties entered into a stipulation which provided that, with respect to Heidi Zeitman, of the \$121,248.00 payment remitted by petitioners, \$1,101.00 will be applied to tax due and the balance of interest and penalty asserted to be due as of May 12, 1986 is as follows:

<u>Interest</u>	\$167.27
<u>Penalty</u>	\$275.00 (Tax Law § 685[a][1])
	55.00 (Tax Law § 685[b][1])
	<u>83.00</u> (Tax Law § 685[b][2])
	\$413.00

The foregoing stipulation further provided that the Notice of Deficiency issued to Heidi Zeitman shall be deemed revised to conform with this paragraph and that she does not dispute her liability for the amount of interest asserted to be due.

The stipulation of the parties also stated that the parties agree that, with respect to Jack Zeitman, of the \$121,248.00 remitted by petitioners, \$99,571.00 will be applied to tax due and \$15,126.03 will be allocated to interest due and owing as of May 12, 1989. Mr. Zeitman claims and the Division disputes that the remaining amount of \$5,449.97 should be refunded.¹ The parties further agree that there is no interest due and owing from Mr. Zeitman and that the amount of penalty in controversy with respect to Mr. Zeitman is as follows:

<u>Penalty</u>	\$24,893.00 (Tax Law § 685[a][1])
	4,979.00 (Tax Law § 685[b][1])
	<u>7,563.00</u> (Tax Law § 685[b][2])
	\$37,435.00

Petitioners did not personally appear and testify at the hearing because they felt that it would impose a great hardship upon them to personally appear in Troy. In an affidavit

¹\$121,248.00 - (\$1,101.00 + \$99,571.00 + \$15,126.03) = \$5,449.97.

Mr. Zeitman explained that, prior to 1987, he owned and operated a company known as FGI Management, Inc. ("FGI"). FGI was a surety bond underwriter for investor notes in tax advantaged limited partnerships. Prior to 1987, FGI had successfully underwritten surety bonds for tax advantaged limited partnerships and employed approximately 30 employees.

According to Mr. Zeitman, FGI ceased as a viable business entity the moment the 1986 Tax Reform Act was enacted. After the enactment of the 1986 Tax Reform Act, he and the employees of FGI would have been out of work but for measures which he personally put in place.

In 1987, Mr. Zeitman created a new company known as Guaranty Acceptance Credit Corporation ("GACC") and he abandoned FGI. Mr. Zeitman states that as he owned and operated FGI, he similarly owned and operated GACC.

GACC was created to provide security for investor notes of limited partnerships (previously secured by investor bonds) and to sell the bonds in private placements. Unfortunately for Mr. Zeitman, various interpretations of the Tax Reform Act of 1986 prevented GACC from being a viable enterprise.

In late 1987 or early 1988, Mr. Zeitman again restructured his business. GACC changed its name to Guaranty Acceptance Capital Corporation ("GACC") and the firm evolved into an investment banking services company providing investment banking services to small and medium-size companies.

As a result of the foregoing corporate transformations, the business offices which Mr. Zeitman maintained were initially transferred from New York City to Los Angeles and then to Phoenix. As a result of these changes, petitioners relocated from New York to Phoenix in December 1986.

In 1987, at the age of 57, against the advice of his accounting and legal advisors, Mr. Zeitman withdrew substantial sums from his pension account to restructure the business. Although GACC remains in existence today, the business restructurings which Mr. Zeitman

was forced to undertake from late 1986 to 1988 took a toll on him professionally and on petitioners personally.

According to Mr. Zeitman, petitioners' personal relocation from New York to Phoenix compounded the turmoil which he and his wife experienced in the corporate transformations and relocation of the business. In the course of the business and personal relocations, many of the records required for the preparation of their 1986 income tax return were temporarily misplaced in storage.

In 1987, Mr. Zeitman and his wife had virtually no income. Petitioners satisfied living expenses from the amounts remaining in Mr. Zeitman's pension plan. Not only were virtually all of petitioners' financial resources utilized in restructuring Mr. Zeitman's business, their personal lives were in turmoil for several years.

Mr. Zeitman explained that, in late 1988, GACC started to become a stable enterprise and petitioners were able to escape from the physical, mental and emotional trauma which they had experienced. In late 1988, the accountant who represented Mr. Zeitman, David Katzenberg, CPA, a resident of New York City, was able to reconstruct petitioners' records relating to the 1986 tax year and thereafter prepare and file the 1986 New York State income tax return.

Prior to 1986, petitioners always filed income tax returns timely and paid income taxes when due.

In support of their position, petitioners submitted an affidavit from an attorney, Howard I. Golden, Esq., who performed legal services for petitioners from April 1985 to May 1991 and for Jack Zeitman's business from April 1985 to May 1991 and from June 1993 to the present. In addition to the information already presented, Mr. Golden states that, prior to 1986, FGI employed approximately 35 individuals and generated substantial annual average underwriting revenue. Shortly after the enactment of the Tax Reform Act of 1986, FGI abruptly went out of existence. Mr. Golden stayed on as general counsel and oversaw the liquidation of assets and eventually lost his job. From 1987 through 1988, as a result of the collapse of the business, Mr. Zeitman became involved in a new business venture involving merger and

acquisition of corporations.

Mr. Golden's affidavit continues that he is aware of the fact that 1987 through 1989 were catastrophic for petitioners. During the years 1987 through 1989, Mr. Golden had to advance legal services without pay for lengthy periods since petitioners needed to try and support Mr. Zeitman's fledgling venture in the merger and acquisition business. It is Mr. Golden's belief that the reason petitioners' 1986 return was not filed and the tax thereunder not timely paid was the catastrophic circumstances surrounding petitioners' personal and business lives during the years 1987 through 1989.

Mr. Golden asserts that the collapse of Mr. Zeitman's business could not have been reasonably predicted. Nor could Mr. Zeitman have provided for the consequences of the collapse of the business. It is noted that Congress enacted a law which retroactively withdrew tax benefits causing the collapse of a multi-billion dollar real estate industry. Mr. Golden concludes that no amount of planning in 1985-1986 could have enhanced petitioners' level of tax compliance.

According to Mr. Golden, it was not until early 1989, when Mr. Zeitman's new business started to make money and he started to get his affairs in order, that petitioners could reasonably have properly prepared and filed accurate tax returns for 1986. Mr. Golden asserts that the 1986 return was filed as soon as possible and that the filing of the return was done by people who had left and had no relationship with New York State. It is submitted that this shows petitioners' good faith.

Petitioners also submitted an affidavit from David M. Katzenberg, CPA. In addition to statements previously made, Mr. Katzenberg states that he assisted petitioners in the preparation of their individual income tax returns from 1984 to 1992 and was personally involved in the preparation of petitioners' 1986 New York State individual income tax return. It is Mr. Katzenberg's belief that petitioners always filed New York State individual income tax returns timely and paid their taxes when due. Mr. Katzenberg states that he knows petitioners to always have been as compliant as they thought possible with respect to their tax matters.

Mr. Katzenberg states that he prepared petitioners' income tax returns based on information provided by petitioners when such information was available from them. In connection with the preparation of the 1986 return, the computer-based income tax return program, which Mr. Katzenberg's office used to prepare tax returns, estimated interest and penalty calculations which were inserted as notes on lines 76 and 77 of the referenced return. According to Mr. Katzenberg, the notes on lines 76 and 77 of the referenced 1986 return were not intended by his office to be determinative of any amount of interest or penalty which might be owing to New York State by petitioners.

SUMMARY OF THE PARTIES' POSITIONS

Petitioners submit that, from a time perspective and also from a physical, mental and emotional perspective, given the circumstances which confronted them from late 1986 to late 1988, they were simply unable to focus on the filing of the 1986 tax return and to properly file such return so that such return would be complete and accurate. Further, apart from the assembly and reconstruction of their records, as a result of the complexity of petitioners' tax position arising from the business and personal matters described above, it was impossible to properly sort out the New York State tax liability for 1986 prior to early 1989.

In a separate affidavit, Mr. Zeitman states that he and his wife have always been as compliant as possible with respect to tax matters and that the late filing and late payment was due to reasonable cause and not willful neglect. Further, the failure to timely file the 1986 return and pay the taxes due was not the result of negligence or intentional disregard of the Tax Law or regulations. Petitioners submit that their 1986 return was not timely filed and the taxes due thereunder not timely paid as a direct result of the catastrophic circumstances surrounding their personal and business lives during the years 1987 through 1989.

Mr. Zeitman lists the following factors as contributing to their inability to timely file the 1986 income tax return and pay the taxes due thereunder:

- "(i) the relocation of my new business to California in 1987;
- "(ii) the relocation in late 1986 of our personal residence to Phoenix, Arizona;

"(iii) unavailability of business records;

"(iv) unavailability of personal records;

"(v) impossibility of developing accurate individual income tax return positions based upon the financial condition of the failed business;

"(vi) impossibility of developing income tax return positions based upon accounting unknowns surrounding the limited partnerships which we were associated;

"(vii) actual and threatened litigation against the business and us individually, arising from the collapse of my business; and

"(viii) enormous distress which we both experienced due to the sudden and unanticipated collapse of my business."

According to petitioners, they filed their 1986 return 19 months after the final extended due date and that this delay was justifiable under the circumstances.

It is the Division's position that the failure of petitioners to appear at the hearing warrants the inference that their testimony would not have supported their case. The Division contends that petitioners' evidence is not sufficient to show that their failure was due to reasonable cause and not willful neglect. According to the Division, the evidence does not reveal sufficient details concerning the "personal disorder" and "catastrophic circumstances" experienced by petitioners. The Division also contends that there was a conspicuous lack of detail with respect to the alleged "catastrophic" and "traumatic" effect of the dissolution of Mr. Zeitman's business and how it interfered with petitioners' ability to comply with the Tax Law.

With respect to the claimed loss of records, the Division notes that the record does not disclose which records were misplaced, where they were misplaced or when they were found. The Division then points out that most of petitioners' income was in the form of wages and there is no proof that W-2's were not issued to petitioners in a timely fashion. The Division further argues that the losses reported on the return were from rental and partnership activity which appears to be unrelated to Mr. Zeitman's business. Therefore, it is difficult to see how the dissolution of the business would be an impediment to the filing of the return.

Lastly, the Division submits that, from the limited proof in the record, it can be surmised

that petitioners made a conscious choice to give formation of the new business venture priority over the filing of their tax return and payment of their liability. The Division contends that this conduct militates against a finding of reasonable cause.

In response to the foregoing, petitioners argue that they did not appear at the hearing because they presently have no nexus to New York. It is submitted that, given the nature of this case, it did not make sense for petitioners to travel a great distance to attend a hearing at which the facts could be adequately presented by affidavits and by counsel.

Petitioners contend that the evidence they presented was sufficiently detailed to meet their burden of proof. According to petitioners, they have shown that the 1986 Tax Reform Act created the "exceptional" circumstances which precluded petitioners from filing their 1986 return.

Petitioners argue that the Division's position disregards the fact that petitioners' ability to file their 1986 return was limited by the circumstances surrounding the collapse of the business and the consequences of the collapse. It was the collapse of the business which compelled petitioners' relocation and involvement in a new business.

With respect to their business records, petitioners assert that even if all of the business and personal records required by them for preparation of their return were available, which they were not, the income tax return position for petitioners could not have been sorted out for many months because of: (1) actual and contingent liabilities of the business, many of which Mr. Zeitman was personally liable for; (2) uncertainty surrounding potential asset distributions to Mr. Zeitman; and (3) uncertainty surrounding the reconciliation of Mr. Zeitman's income and loan accounts with respect to the business.

According to petitioners, the request for an extension of time should draw a positive inference in that petitioners did that which could be done, under the circumstances, to comply with the income tax laws.

Petitioners argue that the Division has not cited one fact to support its assertion that petitioners made a conscious choice to give the formation of their new business a priority over

the filing of their 1986 income tax return. Petitioners submit that it was the collapse of the old business and not the formation of the new business which bears upon the noncompliance with the tax laws.

Lastly, petitioners contend that their good faith is shown by their filing of the income tax return and payment of the tax due thereunder "only 19 months after the extended due date therefore, when Petitioners had no nexus to New York State." Petitioners also paid approximately \$120,000.00 in addition to tax withheld which included approximately \$20,000.00 more than the stated income tax liability. In conclusion, petitioners maintain that they have demonstrated that, under the circumstances applicable to them, they exercised ordinary care and prudence regarding their 1986 income tax return.

In accordance with State Administrative Procedure Act § 307(1), proposed Findings of Fact 1, 2 and 3 have been substantially included in the determination. Findings of Fact 2 and 3 have been substituted for proposed Finding of Fact 4. Proposed Finding of Fact 5 is not fully supported by the record. Findings of Fact 5 and 6 have been substituted for proposed Findings of Fact 6 and 7. Findings of Fact 4 and 5 have been substituted for proposed Findings of Fact 8 and 9. Proposed Findings of Fact 10 and 11 are not supported by the record. Proposed Findings of Fact 12 through 15 are rejected as argumentative. The proposed Conclusions of Law are rejected since there is no provision in the State Administrative Procedure Act for submitting proposed Conclusions of Law. It is noted that the original Statement of Audit Changes was not included in the record. Therefore, it was not possible to confirm the accuracy of a portion of the proposed Findings of Fact.

CONCLUSIONS OF LAW

A. Tax Law § 651(a)(1) requires every resident individual who is required to file a Federal income tax return for the taxable year to make and file a New York State individual income tax return on or before the 15th day of the fourth month following the close of the taxable year. To the extent relevant herein, penalties may be imposed for failure to file a return (Tax Law § 685[a][1]). Penalties may also be imposed if any part of a deficiency is due to

negligence or intentional disregard of Article 22 of the Tax Law or the rules and regulations thereunder (Tax Law § 685[b][1], [2]). If the failure to file a return is due to reasonable cause, the penalty may be abated (Tax Law § 685[a][1]).

B. Since petitioners were cash-basis taxpayers, their income tax return for the 1986 taxable year was originally due on April 15, 1987 (Tax Law § 651[a][1]). Petitioners were then granted an automatic four-month extension of time to file. As a result of this extension, their return was due on August 15, 1987. Petitioners then requested that they be given until October 15, 1987 to file their New York State return for the calendar year 1986. This extension was also granted. Therefore, the question becomes whether petitioners have shown reasonable cause for their failure to file a return from October 15, 1987 until May 12, 1989, when their New York State income tax return was actually filed.

C. Initially, it is noted that the accuracy of the purely factual assertions in petitioners' affidavits have been accepted on their face (see, Matter of Orvis v. Tax Appeals Tribunal, 204 AD2d 916, 612 NYS2d 503, lv granted 84 NY2d 805). However, the question remains whether these statements are sufficient to show that petitioners' failure to file their return and pay the tax was due to reasonable cause and not willful neglect.

D. The reasons presented by petitioners as to why they feel they have established reasonable cause fall into several categories. Petitioners contend that the relocation of their business and their home as well as the unavailability of certain records contributed to their inability to prepare timely returns. Petitioners also submit that uncertainties prevented them from preparing an income tax return.

E. During the year in issue, the regulations of the former State Tax Commission provided:

"(i) Where an inability to timely obtain and assemble essential information required for the preparation of a complete New York State income tax return exists and extensions of time for filing such return are available pursuant to section 151.1 of this Title, such extensions of time for filing must be obtained, a return which reflects the known tax liability must be filed on or before the extended due date for filing and any balance of tax must be paid with the return on that portion of the tax liability which can be ascertained and shown on such return. The relevant facts affecting that portion of the tax liability which cannot be ascertained must be fully

disclosed with the timely filed New York State income tax return. When such liability is ascertained, an amended New York State income tax return must be immediately filed together with any additional tax due.

"(ii) However, where a taxpayer:

"(a) makes a timely application for an extension of time to file the New York State income tax return;

"(b) makes a good faith effort to properly estimate the tax due in accordance with section 151.2 of this Title; and

"(c) pays with the application for extension of time for filing any unpaid balance of the tax as estimated;

"an inability for reasons beyond the taxpayer's control to obtain and assemble essential information may constitute reasonable cause for failure to file a New York State income tax return and for failure to pay the amount shown as tax on such return, where such inability precluded the taxpayer from properly estimating the tax as finally determined (see section 151.2[a][4][i] of this Title) thereby invalidating the extensions of time for filing the New York State income tax return. In support of this ground as a basis for reasonable cause, the taxpayer or the taxpayer's representative must indicate what information was unavailable and explain the reason or reasons why such information was unavailable, despite reasonable efforts by or on behalf of the taxpayer to obtain the missing information. It must further be explained how the original estimation of tax was derived and what, if any, allowances were included in the estimation to provide for the unknown tax liability" (20 NYCRR former 102.7[e][2]).

F. It is clear from the foregoing that neither petitioners' relocations nor their uncertainties warranted the delay in filing the return. At a minimum, petitioners should have filed a return on or before the extended due date and paid that portion of the tax liability which could be ascertained and shown on the return. Petitioners' good filing history does not excuse the failure to comply with the foregoing regulation (see, Matter of Ross-Viking Merchandise Corp., Tax Appeals Tribunal, August 8, 1991, confirmed 188 AD2d 698, 590 NYS2d 576).

G. Petitioners' argument, that the economic distress they encountered warranted the delay, is also unpersuasive. Economic difficulties do not excuse a failure to pay taxes (Matter of Dworkin Construction Co., Tax Appeals Tribunal, August 4, 1988).

H. Petitioners' claims of physical, mental and emotional trauma are also insufficient to warrant a finding of reasonable cause and not willful neglect. First, there is no medical evidence to support these claims. Further, petitioners had the wherewithal to move to a new location and begin new businesses. Under these circumstances, petitioners' claims that they

were emotionally unable to prepare their return is not convincing.

I. The cases cited by petitioners do not warrant a different result. First, petitioners' reference to a determination of an Administrative Law Judge will not be considered since such determinations may not be considered as precedent (Tax Law § 2010[5]). Petitioners reliance upon Matter of Day (State Tax Commission, November 7, 1995) is misplaced because in that case the petitioner, unlike the situation herein, timely prepared his return. Lastly, in Matter of Interknitting Ltd. (State Tax Commission, August 14, 1987), the failure was not due to reasonable cause. Therefore, this case does not support petitioners' position.

J. The petitions of Jack Zeitman and Heidi Zeitman are denied.

DATED: Troy, New York
April 20, 1995

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE